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Supreme Court of the United States

OCTOBER TERM, 1936
No. 31

JOSE RIVERA SOLER & CO., INC.,
Petitioner,

against

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENT

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JOSE RIVERA SOLER & CO., INC.,
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against

THE UNITED FIREMEN'S INSURANCE COMPANY OF PHILADELPHIA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

BRIEF FOR RESPONDENT.

Opinions Below.

The first opinion of the Circuit Court of Appeals is reported in 77 Fed. 2d 891. Its opinion on reargument is reported in 81 Fed. 2d 385.

Statement of the Case.

Petitioner brought suit against respondent in the District Court of the United States for Puerto Rico upon a policy of fire insurance for $30,000 issued by respondent on *February 9, 1932* (R. 1-4). It claimed a total loss from a fire occurring *March 13, 1932,* and claimed that the property destroyed was worth $35,926.06 (R. 3, 252, 259).

Respondent defended upon the ground that the policy had been forfeited by the making of false declarations and fraudulent claims thereunder (R. 6-8) and by failure to comply with the Iron Safe Clause (R. 8, 9).

At the close of all the evidence, respondent moved for the direction of a verdict in its favor (R. 11, 12-14). That motion was denied and an exception noted (R. 11). The jury returned a verdict in the following form: *"We, the jury, find for the plaintiff and assess its damages in the sum of $17,000 plus interest at 6 per cent"* (R. 12). The District Court "ordered that judgment in accordance with the verdict of the jury be entered" (R. 24), and a judgment that petitioner recover of respondent $17,000 with interest and costs was then entered (R. 23, 24).

Respondent appealed, and assigned as error

(a) The refusal to direct a verdict because of failure to comply with the Iron Safe Clause (R. 25);

(b) The refusal to direct a verdict upon the ground that it appeared from the evidence as matter of law that the claim presented was false and fraudulent (R. 25, 26);

(c) The refusal of the court to instruct the jury that there was no evidence from which "cost of labor", which was one item of the claim, could be determined (R. 26);

(d) The refusal of the court to instruct the jury that there was no evidence from which it could determine the market value of merchandise claimed to have been sold by petitioner's president to petitioner and that petitioner could not recover for the loss of the merchandise so sold (R. 26);

(e) The verdict and judgment are contrary to law (R. 26).

Upon the first hearing before it, the Circuit Court of Appeals affirmed the judgment of the District Court (R. 340). It held that the questions as to fraud and compliance with the Iron Safe Clause were for the jury and that the jury were properly instructed, and *refused to consider* the contention that the verdict and judgment were contrary to law. As to that contention, it said (R. 317, 318; 77 Fed. 2d 893):

> "As to the tenth assignment of error, the value of the destroyed property as claimed by the plaintiff was about $34,000. The jury's verdict was for $17,000. *The defendant contends that the verdict, fixing the value of the property at only about one-half of what was claimed in the proof of loss, established as a matter of law that there was fraudulent overvaluation by the plaintiff in the proof of loss.* Obviously, this question could not arise until after the verdict; it amounts to a contention that the verdict in favor of the plaintiff was inconsistent and contradictory to the finding on damages. Questions of this character should be presented in the first instance to the trial judge. He has never passed upon this point. No ruling of his upon it was excepted to; no exception relating to it appears in the record. We cannot consider it."

A petition for rehearing (R. 319-332) was afterwards granted (R. 340); and after a reargument the Circuit Court of Appeals vacated its order affirming the judgment of the District Court and also vacated the judgment of the District Court and remanded the cause to that court with directions to enter an order in arrest of judgment (R. 341).

In the opinion delivered upon the reargument the court held that no motion or exception was necessary to present any error appearing upon the face of the "record proper", which, it said, consisted of the complaint (including the

proof of loss and policy which were made a part thereof) and the verdict and judgment (R. 333, 334). It then held that the verdict itself established fraud as a matter of law because it found that property which petitioner had sworn was worth $35,926.06 was worth only $17,000 (R. 334, 336). It then also held that in considering the motion for a directed verdict it might consider the evidence (inasmuch as it had been made a part of the record by a bill of exceptions) and that such evidence conclusively established fraud with respect to the item of cost of labor on goods in process of $2,524.50 (R. 336). The question as to compliance with the Iron Safe Clause was not adverted to.

There was a dissenting opinion by the Judge who had written for the court upon the first hearing (R. 337).

Certiorari was later granted by this court.

Questions Presented.

It is settled that it is open to respondent to defend and sustain the final decision of the Circuit Court of Appeals upon any of the grounds which were urged in that court in opposition to the judgment of the District Court, regardless of whether the Circuit Court of Appeals sustained or rejected those grounds (*Langnes* v. *Green,* 282 U. S. 531, 538, 539; *United States* v. *American Ry. Exp. Co.,* 265 U. S. 425, 435).

We therefore shall here argue each of the questions presented by the assignments of error as set out at page 2, *supra;* and we call particular attention to the great and general importance of the question whether respondent was entitled to a directed verdict because of failure to comply with the Iron Safe Clause. That question is important because it affects perhaps every existing policy in

this country covering a stock of merchandise, and, also, because the Circuit Court of Appeals for the First Circuit, as we believe, is not following the rule laid down by this court with respect to when verdicts should be directed.

A more particular formulation of the questions is as follows:

1. Where the insured's own evidence shows that his inventory lists only merchandise owned, and not merchandise held for others (the policy covering both classes), and that his books are not such as to permit a determination therefrom as to what stock was on hand at the time of the fire, is there not such a failure to comply with the Iron Safe Clause as entitles the insurer to the direction of a verdict?

2. Where the policy provides that all benefit under it shall be forfeited if the claim be in any respect fraudulent, and the insured's own evidence shows that some, at least, of the books and records produced in support of his claim could not be genuine, and that some, at least, of the testimony offered in support of his claim is false, is not the insurer entitled to the direction of a verdict?

3. Where the property insured and destroyed is of an ordinary nature, having no unique qualities, and is being used in the insured's business, and the insured asserts that it is worth $35,926.06 and claims the total face of the policy of $30,000, and the jury finds that the property destroyed is worth only $17,000, does not the verdict itself establish that the claim is fraudulent and, therefore, that the insurer, not the insured, is entitled to judgment on such verdict?

4. Where the Circuit Court of Appeals finds that a verdict does not support the judgment which the District Court has entered upon it, and, on the contrary, supports

only a judgment for the opposite party, can the Circuit Court of Appeals direct the entry of an order in arrest of judgment, or must it award a new trial?

5. Where there is no evidence to sustain a particular part or portion of a claim, is not the court bound, upon request, to grant an instruction to that effect?

Petitioner and Its Business.

Petitioner was organized in 1929 and took over an existing business of Jose Rivera Soler, who at all times was its president, principal stockholder and manager (R. 105, 96). Its total capital is $10,000 (R. 288).

Petitioner's business, at least until a month before the fire, was that of manufacturing and embroidering children's clothes, tablecloths, towels, and similar articles, the materials for which, except the thread, were sent to it by dealers in the United States and belonged to such dealers and not to petitioner (R. 55, 56, 111, 133). It manufactured some *remnants* for its own account, but never bought materials to manufacture for its own account (R. 111, 133). Some of the work was done on machines in petitioner's factory, but large quantities of materials were sent out to be sewed and embroidered in the homes of operatives (R. 43, 67, 149-152).

In February, 1932—the month in which the policy was issued—all the shares of petitioner's capital stock, except those held by Rivera Soler, were purchased by I. L. Berrios Berdecia, who became treasurer. Those shares had been acquired by three other individuals in June or July, 1931, for $5,000 (of which $3,000 was paid in cash and $2,000 in machinery, furniture and accessories) and were sold in February 1932 by those three individuals to I. L. Berrios Berdecia for $2,500 because there were no profits in the

business and because they had had some differences with Rivera Soler (R. 133).

At the time of the fire petitioner had accounts receivable of $769.99, and 57 cents in cash (R. 35).

The Policy.

The policy insured against loss and damage by fire, in the amounts specified, the following property (R. 240, 241):

$15,000.00: On stock of *merchandise,* unembroidered, embroidered and in the process of being embroidered, or for repairs, and on *cost of labor* performed thereon, including all *materials,* ingredients and supplies used in the manufacturing, and repairing the same, including boxes, samples and packages, *the property of the assured, or held in trust or in commission, or consignment, or on joint account with others, or held on storage for which the assured may be legally liable,* or sold but not delivered all while contained in the two-story concrete building with zinc roof, situated at Pumarada St. #4, block #657, of the suburb of Santurce, San Juan, Puerto Rico.

$12,000.00: On machinery of every description, motors, electrical installations, including cost of installation of machinery, motors, boilers, stoves, implements, parts, spare parts, instruments and any other materials used for repairs and/or conservation of the machinery for the manufacture of embroidered goods in the premises described above.

$ 3,000.00: On furniture, fixtures, including tables, shelves, stands, office furniture and fixtures, printed supplies, labels, additions and repairs made in the premises above mentioned.

$30,000.00: Total.

Condition "12" of the policy provides (R. 248):

"If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or anyone acting on his behalf to obtain any benefit under this policy; * * * all benefit under this policy shall be forfeited."

The Iron Safe Clause is as follows (R. 243):

"1st. The Assured will take a *complete itemized inventory of stock on hand* at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date and upon demand of the Assured the unearned premium from such date shall be returned.

2nd. The Assured will keep *a set of books,* which shall clearly and plainly present *a complete record of business transacted,* including all *purchases, sales* and *shipments,* both for cash and credit, from date of inventory as provided for in the first section of this clause, and during the continuance of this policy.

3rd. The Assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times, when the building mentioned in this policy is not actually open for business; or failing in this, the Assured shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

In the event of failure to produce such set of books and inventories for the inspection of this Company, this policy shall become null and void."

The Proof of Claim.

The policy required that, in the event of loss, the insured should submit a written claim setting forth the items of property damaged or destroyed and the amount of the loss "having regard to their value at the time of the loss or damage, not including profit of any kind" (R. 247).

The claim presented by petitioner pursuant to that requirement is Exhibit 16 (R. 252-259). In this claim petitioner stated that the objects specified therein were owned by it; that they were damaged or destroyed to the extent stated (*i. e.*, totally); and that the cash value of such objects "is as expressed in said statement taking in consideration their value at the time of the fire, without including any profit" (R. 252).

The first item set out in the claim is as follows (R. 253):

"First Item:

Printing and office supplies---	$ 141.35	
Raw materials for production	9,440.64	
Manufactured and unmanufactured goods ----------	4,838.72	
Labor on goods in process----	2,524.50	
Drawn and perforated patterns ----------	400.00	
Total on the day of the fire---	$17,345.21	
Value of the salvage 'total Loss' ----------	0.00	
Total of the loss----------	17,345.21	
Amount insured under this item of the Policy No. 13380----	$15,000.00	
Amount claimed under this item---------		$15,000.00"

The claim also gives a detailed list of articles claimed to be covered by the second and third items of the policy

(machinery and accessories, and furniture, tools, implements). (R. 253-255.)

The loss under item 2 is stated to be $14,835.10, and the full amount insured of $12,000 is claimed (R. 253, 254).

The property listed under item 3 as totally destroyed is valued at $3,745.75, and the full policy coverage of $3,000 is claimed (R. 254, 255).

Evidence as to Compliance with Iron Safe Clause.

The inventory produced by petitioner concededly, and as appears from a bare inspection of it, purports to be, at most, an inventory of only the goods owned by petitioner. No inventory of goods held in trust or on commission or consignment or joint account or on storage was produced, and there is no evidence that any inventory of such goods was kept.*

Petitioner's bookkeeper, Wolf, made the general statement that the books he produced contained a complete record of the business transacted by petitioner, including all purchases and sales and shipments (R. 33). Its expert accountant, Gorbea, also made the general statement that the books were a complete record of the business (R. 40). *But each of those witnesses afterwards gave definite and specific testimony precisely to the contrary.*

Petitioner's bookkeeper testified (R. 65):

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*The inventory book was marked Exhibit 4 for Identification at R. 31. It was then admitted in evidence, along with other books, for the limited purpose of showing compliance with the Iron Safe Clause at R. 34. It was then admitted generally at R. 45-47. It is not printed in the transcript but was physically transmitted to the Circuit Court of Appeals (R. 311-313). A copy of the inventory of December 31, 1931, as contained in that book, was produced by petitioner's witness, Simon Rojas Negron, and upon his cross-examination that copy was marked as Respondent's Exhibit 5 for Identification (R. 123, 124). That copy was then received in evidence as Respondent's Exhibit 15 at R. 232, 233, and it is printed at R. 291-293.

> *"We did not carry a stock book,* * * *; there is no way of determining from the books* how many yards of material, cloth, was used in any one month, or how many yards of thread; I cannot tell; we had, for instance, a certain amount of thread on hand, and from that amount we used thread for all purposes."

He also testified (R. 83):

> *"The plaintiff corporation did not have a cash book;* * * *."*

He claimed that there was "no necessity" for a stock book because "we could determine how many yards were left of any one material at the end of any one month by making an inventory" (R. 65). But he admitted that inventories were not made every month and that there was "no way of determining from the books" how much material had been used (R. 65).

As an attempted substitute for a cash book, petitioner presented a copy of its account with its bank as obtained from the bank after the fire (R. 79, 80), the original bank statements and cancelled checks having been destroyed because not kept in the safe (R. 80). But its bookkeeper admitted that "there is no way of determining whom those checks were issued to" (R. 80), and that the bank's statement "only shows the amount for which it (the check) was issued and the amounts of the deposits" (R. 80). There was thus nothing to show the source from which the cash was derived or the purpose for which the checks were issued.

Neither were there any books or records from which there could be determined the amount of materials which at the time of the fire were in the homes of operatives to be worked upon (R. 120, 121, 225, 226), although there were times when material was being sent out to 40 or 50 or 60 different people (R. 68).

Gorbea, the accountant, merely examined the books after the fire and concededly had no personal knowledge of the business (R. 35, 37, 39) and hence could not know whether or not the books constituted a complete record of the business, and he did not pretend that the books showed what stock was on hand. His testimony as to what the books showed was, not that the books showed so many yards or dozens of specific articles, but merely that they contained entries of lump sums for unspecified quantities of general classes of articles (R. 35, 36, 41), and when asked by a juror whether there was a stock book which would show the amount of merchandise on hand on the day of the fire, he stated directly and specifically: *"Well, that cannot be done"* (R. 41). He also testified (R. 44):

> *"I can't tell how much they had in the factory* because I don't know what goods were in the factory; the letter that I have mentioned was about the statement of their account to the last day; *as far as I interpret the books I don't know what there was in the factory on the date of the fire; I don't know how much was out on the island;* I don't know what it was worth; *I don't know whether the valuations given in the books are correct, whether they are accurate or inaccurate."*

Evidence as to Cost of Labor.

As noted above, the first item of the policy covered *cost of labor* as well as merchandise and materials (R. 240; *supra,* p. 7), and in its proof of claim petitioner claimed $2,524.50 for "Labor on goods in process" in addition to $9,440.64 for raw materials for production and $4,838.72 for manufactured and unmanufactured goods (R. 253; *supra,* p. 9). As also noted above, the proof of claim expressly stated, as required by the policy, that no profit was included (R. 252; *supra,* p. 9).

The testimony of petitioners' president, Rivera Soler, is plain and explicit, however, to the effect that the item of $2,524.50 was not for labor nor for the cost of labor, but, on the contrary, was the contract price of manufactured merchandise and included profit and overhead expense. At R. 110 he testified:

> "the item that I have included in my claim for labor on merchandise in stock refers exclusively to the articles that I was manufacturing for these New York houses; I don't know if in that item there is included also the thread; *no, in that item there is included only the price that we collected from the people in New York;* that is to say, if my *contract price* was 75 cents a dozen for creepers, a certain class of creepers, and I had ten dozens of those on hand, that $7.50 was insured."

Also at R. 116, 117:

> "my company is not claiming for this material that belonged to somebody else from the defendant company, we have calculated what we have paid for labor on that; *not for labor, but what we collect or charge for labor and for the loss of our silk; I am not claiming from the defendant company the money that I have paid to the employees for working this material;* I calculate that when a lot of material is finished, we are unable to charge only what we have paid for the work, because that is material that is already finished and ready for shipment, and all the overheads are incurred upon those goods, and if for a dozen garments we are paid $24 to make them, I in my calculations put there $24; it may be that I have paid $2 for that, but it is worth $24 to me; I *include the cost of labor, the overhead expenses and my profit,* the article being finished and ready for shipment at the time of the fire."

Evidence as to What Property was Destroyed and the Value Thereof.

The evidence upon this subject consisted of (a) certain books which it was claimed showed what property petitioner had acquired and disposed of,* and (b) testimony by certain officers of petitioner that the property shown by the books was in the factory at the time of the fire and that everything in the factory was destroyed.

The incompleteness of the books in certain respects already has been shown by what we already have said (pp. 10-12, *supra*). Their utter lack of trustworthiness is shown by other evidence now to be mentioned.

The book which was produced as petitioner's ledger (R. 31; Ex. 1) contains entries which are dated as early as March, 1929, but which admittedly were made by a bookkeeper, Wolf, who did not enter petitioner's employ until 1930 (R. 59, 60). Another bookkeeper, Garcia, opened a set of books for petitioner in 1929, but this ledger was not among those which he opened (R. 237-239). The book thus obviously and indisputably, and according to petitioner's own witnesses, was written up at some date considerably subsequent to the time as of which it purports to speak; and there is evidence that petitioner purchased a ledger in March 1932 (R. 70). The index tabs on the book are new, and do not bear evidence of having been used from 1929 to 1932 (R. 189, 190). The index page for the letters A to C is written twice (R. 190)—a natural error for one constructing a book, but a most unnatural thing to occur in a book in which entries are being made in the regular course of business. The item next succeeding the entry of December 31, 1930, originally was entered as January 1, 1932, and the figure *1* was then put

*After being admitted for a limited purpose at R. 34, the books and some other records were admitted generally at R. 45-54.

over the *2* so as to change 1932 to 1931 (See Ex. 1, p. 1)—another clear indication that the book was written up in 1932 (See R. 191). The absence of pencil footings at the end of each month is another indication that the book was not kept in the usual course of business (R. 190) *.

The book produced as petitioner's inventory book (R. 31; Ex. 4) is of the same general type and appearance as the ledger. It contains no inventory for 1929, but contains inventories for December 31, 1930, and December 31, 1931, in very perfect style.

So much for the books themselves. Now as to their contents.

As to Machinery.

The machinery account, at page 1 of the ledger (Ex. 1), opens with a credit of $3,286.50 under date of March 1, 1929. There is no further entry during 1929, and no closing of the account at the end of 1929. Under date of December 31, 1930, the balance is entered as $4,951—which corresponds exactly with the inventory of the same date as it appears in Exhibit 4. The principal additions during 1931 are $2,253.68 on March 20 and $7,522.45 on July 13. According to the ledger, therefore, the principal items making up the $14,835.10 claimed in the proof of loss as the value of the machinery destroyed (R. 253, 254) are:

On hand December 31, 1930	$4,951.
Acquired March 20, 1931	2,253.68
Acquired July 13, 1931	7,522.45
	$14,727.13

*The references to R. 189, 190, 191, are to the testimony of a witness called by respondent, but it is to be carefully noted that that witness was merely reciting, for the convenience of court and jury, what he observed about petitioner's books which had been put in evidence by petitioner. The evidence relied on is the books themselves, and thus in petitioner's evidence and not respondent's evidence.

The total of those three items is three cents more than the amount of machinery shown in the inventory of December 31, 1931 (R. 291, 292). It is $107.97 less than the $14,835.10 claimed in the proof of loss (R. 253, 254), and it is of considerable significance that to arrive at the total of $14,835.10 claimed in the proof of loss it is necessary to include an item of $91.75 which was entered in the ledger under date of March 18, 1932 (Ex. 1, p. 1), which was five days after the fire.

Passing those discrepancies, we turn to the testimony as to the three principal items tabulated above.

Rivera Soler testified that when petitioner was organized he sold to it about 14 Singer sewing machines and a cutting machine which he had when engaged in business on his own account (R. 105). He was unable to say, however, from whom he had purchased those machines or how much he had paid for them (R. 105), and no other evidence upon that point was adduced. He also testified that later on he individually purchased around 24 or 28 machines from Dolcey & Company for $1,400 and then sold those machines to petitioner for $2,253.88 (R. 106, 115)—which obviously is the above tabulated item of $2,253.68 recorded in the ledger under date of March 20, 1931.* Those machines had been purchased by Dolcey from the Singer Sewing Machine Company in January 1928—more than four years before the fire—for not over $2,100 (R. 142, 143).

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*Petitioner's bookkeeper, Wolf, testified that the ledger entry of $2253.68 of March 20, 1931, represented machinery purchased by Rivera Soler from Dolcey (R. 61). He also referred to an invoice which, he said, showed that on *January 14, 1931*, Rivera Soler personally purchased from Dolcey 26 machines and some other articles which totalled $2253.68 (R. 62), but he also said that he did not know what business Rivera Soler had with Dolcey, that Rivera Soler told him to pay Dolcey only $1400, and that the matter could be explained by Rivera Soler (R. 62). Rivera Soler's testimony as given in the text hence must be accepted as the true account, and that testimony demonstrates that he claimed $2,253.68 as the value in 1932 of second hand machines which he knew he had purchased in 1931 for $1400.

The only other machines mentioned by Rivera Soler upon his direct examination as having been acquired by petitioner were those which he said were brought into the corporation by "Escudero, Valloveras and I don't remember the name of the other" (R. 98), and he specifically stated that when those additional machines were so brought in there was an appraisal of *all* the machines and that a memorandum of the machines and prices was made (R. 98). That memorandum subsequently was offered in evidence by petitioner (R. 107), and it shows that the total, not only of the machines, but, also, of the furniture, brought in by *all* the parties, was $9,869.92, of which $7,869.92 was credited to Rivera Soler and $2,000 was credited to Escudero, Valloveras, and Pumarada (R. 279, 280). Rivera Soler then further testified (R. 98):

> "Besides the machines that I have already described (original purchase of 14 machines, Dolcey machines, and those brought in by Pumarada, Valloveras and Escudero) *there were no other machines acquired by the corporation or sold by me to the corporation;* it may be that there were, because there might have been some machines that were purchased specially, but really I don't believe there were any."

The time when Escudero, Valloveras, and Pumarada came into the corporation was July, 193 (R. 107, 131), and the above mentioned memorandum of the appraisal then made thus *demonstrates the falsity of the ledger entry showing additional acquisitions of $7,522.45 on July 13, 1931.*

Rivera Soler then *changed his prior testimony* and stated that he purchased additional machines after the purchase of the Dolcey machines (R. 106). He then made that more specific by saying "and then in July, 1931, I sold the

corporation more machinery for $7,500'' (R. 115). When pressed for details as to this large purchase and sale—larger than the combined acquisitions of machinery as to which he previously had testified—he said (R. 115):

> ''the machinery that I bought some time shortly before July, 1931, that I had in my house in Guaynabo, and that I sold to the corporation, was bought by me on two or three occasions; I didn't buy it all at once, and I also bought some here in Puerto Rico; in Mayaguez I purchased some ordinary sewing machines; this machinery was special rebuilt machines that I bought in New York, and I bought some up there which were not rebuilt machines either; I am referring to the machinery that I sold to the corporation in July, 1931; *I am unable to state where and when I bought it;* I have machines on hand right now that if you ask me where I bought them I could not tell you; I would invite the jury to go to my house to see if I carry any system of books, and I am doing a big business right now; as to whether I buy machines for a value of $7,500 and don't know where or when I bought them, I have bought them on different occasions.''

The ledger entries of $2,253.68 under date of March 20, 1931, and of $7,522.45 under date of July 13, 1931, are further impugned by the fact that they purport to be substantiated by Vouchers Nos. 829 and 1023 respectively, and those vouchers are upon a printed form which did not come into use until November, 1931. That is to say, all vouchers preceding No. 829, and all vouchers succeeding it down to Voucher No. 1173, are on forms provided by Real Hermanos and bear their printed name and job number, except that Nos. 829 and 1023 are on forms which do not bear that name or job number and which are identical in form with vouchers subsequent to No. 1173 (R. 193, 194, 195).

We may even disregard these plain indications of fraud, however, for even Rivera Soler's changed testimony makes no claim of any additional purchases of machinery *after July 13, 1931,* when Escudero, Valloveras, and Pumarada came into the corporation (R. 107, 131), and the memorandum of the appraisal which was then made thus definitely and conclusively establishes the falsity of the inventory of December 31, 1931 (R. 291, 292) and of the proof of loss (R. 253, 254) because it shows that the value of all the machinery plus some other articles was only $9869.92 (R. 280) whereas the inventory sets forth the value of the machinery at $14,727.10 (R. 292) and the proof of loss states its value at $14,835.10 (R. 254).

So, too, the falsity of the ledger entry showing machines on hand on December 30, 1930, at $4951 is demonstrated by Rivera Soler's testimony that the only machines acquired to that date were the 14 sewing machines and one cutting machine which he sold to petitioner upon its organization (*supra,* pp. 16, 17). As he paid Dolcey only $1400 for 24 or 28 similar machines in 1931, the 14 which he sold to petitioner upon its organization obviously could not have been worth $4951 and he obviously knew they were not worth that amount.

There is also other uncontradicted evidence of palpable padding. For example:

The 22W100 machine is obsolete (R. 144, 145), and yet it is listed in the proof of loss at $172 (R. 254).

The 112W115 machine sells new for $161.25 (R. 144), and yet two are listed in the proof of loss at $410 (R. 254).

The 51-10 machine sells new for $51.25 (R. 145) and is listed in the proof of loss at $140 (R. 254).

Transmissions are part of the power table (space for benches) and they, together with shaft and belting, are included in the selling price new of $19.50 (R. 145), and yet

the proof of claim lists 86 spaces for benches at the selling price new of $19.50 and then separately lists 85 transmissions at an additional $595 and shafts at an additional $96 and belting at an additional $43.50 (R. 254).

As to Materials and Merchandise.

The evidence makes it impossible to distinguish accurately between these two items—a result which flows from the failure to comply with the Iron Safe Clause. The proof of claim values one at $9440.64 and the other at $4838.72 (R. 253), which is a total of $14,279.36. The inventory of December 31, 1931, values one at $2324.74 and the other at $5334.40 (R. 293), which is a total of $7,659.14. The ledger, as of the same date, shows materials at only $800 (Ex. 1, p. 5) and merchandise left over (sobrantes) at only $1379.75 (Ex. 1, p. 27), which is a total of only $2179.75.

To justify the claim made in the proof of loss, Rivera Soler testified to a purchase by himself of a large quantity of thread and to another large purchase of silk and broadcloth (R. 111).

As to the thread, he said he purchased a considerable quantity in New York in December 1931 or January 1932 (R. 111) and then sold it to petitioner in February 1932 (R. 113). He said he was unable to state what the thread cost him, but said that he sold it to petitioner at a price higher than he paid for it (R. 111). He also said that he brought the thread from New York in his stateroom as baggage and that he paid no excise tax upon it (R. 113). According to the entry in the ledger and the supporting voucher, however, this thread was supplied by Soler to petitioner *up to December 31, 1931* (Ex. 1, p. 5; Voucher No. 1266). If that be so, it must be included in, and is not to be added to, the $2,324.74 listed in the inventory of that date (R. 293).

As to the silk and broadcloth, Rivera Soler testified that he bought it "from somebody by the name of Nieva, in Mayaguez" for something over $6,200 (R. 111). He says the sale was on credit although he never had done business with Nieva before (R. 111) and that he brought a "considerable amount" of the silk from Mayaguez in his own automobile (R. 112). It had not been paid for at the time of the fire (R. 111, 112) and there is no evidence that it all had been delivered at the time of the fire.

The silk was credited to Rivera Soler at $6,338.34 under date of March 12, 1932 (Ex. 5, account of Jose Rivera Soler), which was the day before the fire. The voucher which purports to support the entry is No. 1280. That voucher, however, is merely a bookkeeper's memorandum to which are attached 4 sheets of paper on the letterhead of Pedro N. Nieva which purport to be invoices dated February 6, 13, 21 and 27, 1932, totalling $6,116. The voucher gives the correct total of three of the invoices but does not coincide with the fourth invoice with respect either to price or amount of goods purporting to be covered by it. Incidentally, the voucher also shows that Nieva was an automobile agent.

The records of the Treasury Department of Puerto Rico do not show the payment of the tax which should have been paid if there in fact had been a sale from Nieva to Rivera Soler (R. 138, 180). When Nieva was asked to pay a tax on such a sale, he visited the revenue agent and asked "What it was all about" (R. 141). He was not called as a witness to establish the sale.

Apart from the invoices above mentioned, there is no evidence as to the value of the goods.

POINT I.

Petitioner's own evidence establishes beyond dispute that it failed to comply with the Iron Safe Clause, and a verdict should have been directed for respondent upon that ground.

The Iron Safe Clause is of great importance to all insurance companies. It is found in every policy upon a shifting stock of merchandise, it is reasonable and fair, and enforcement of it is necessary to prevent frauds and impositions upon insurers.*

The clause requires "a complete itemized inventory of stock on hand" and "a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit" (R. 243). It requires that such inventory and books be kept in a safe or in some place not exposed to fire, and it provides that failure to produce such books and inventory shall cause the policy to be void (R. 243).

The plain purport and intent of the clause is that after a fire an exact determination of just what the insured merchandise consisted of at the time of the fire can be made by taking the inventory and then adding the subsequent purchases and deducting the subsequent sales recorded in the books; and the settled construction of the clause is that the inventory and books must be such that that determination can be made *from the inventory and books themselves,* unaided by oral testimony except testimony as to the method of keeping the records (*Home Ins. Co.* v. *Williams,* 237 Fed. 171, 176, 177; *New York Underwriters' Fire Ins. Co.* v. *Malhan & Co.,* 25 Fed. 2d 415, 421;

*Phoenix Ins. Co. v. Sherman, 110 Va. 435, 438, 439, 66 S. E. 81; Scottish Union Ins. Co. v. Virginia Shirt Co., 113 Va. 353, 361, 74 S. E. 228.

London Assurance Corp. v. *Poole,* 212 Ala. 109, 101 So. 831; *Merchants Ins. Co.* v. *Johnson,* 135 Miss. 311, 99 So. 899; *Pennsylvania Fire Ins. Co.* v. *Malone,* 217 Ala. 168, 115 So. 156, 56 A. L. R. 1075; *Fire Association of Philadelphia* v. *Hinton* (Tex. Civ. App.), 298 S. W. 178; *Mandelthord* v. *Union Indemnity Co.,* 31 Ohio App. 423, 167 N. E. 480; *Garten* v. *General Accident &c. Corp.,* 206 N. Y. App. Div. 154, 157, 158).

In the case at bar, petitioner's own witnesses, its bookkeeper and accountant, *specifically admitted that such determination could not be made from the books kept and produced by petitioner,* and the conceded absence of a stock book or cash book demonstrates that such admission was necessary (pp. 11, 12, *supra*). The utmost that the books show are lump sums for unspecified quantities of general classes of goods, without any itemization of quantities by which the sums can be checked. So, too, petitioner's inventory obviously was not complete because it does not list merchandise held for others (p. 10, *supra*).

Despite that condition of the evidence, the Circuit Court of Appeals held that whether or not the clause had been complied with was a question for the jury, its statement upon that point being as follows (R. 317; 77 Fed. 2d 892):

> "The plaintiff offered the evidence of several witnesses, including an expert accountant, to the effect that its books and accounts were of such character as to afford a reasonably complete picture of its business activities, that they were honestly made and kept as required by the policy, and that the proofs of loss conformed to the books and were honest. While the defendant introduced a good deal of evidence to the contrary through witnesses who testified that the books and records were incomplete and insufficient, and not properly kept, and showed clear indications

of having been fabricated, the questions were plainly for the jury to determine."

The Circuit Court of Appeals thus did either one of two things. It either (a) overlooked the fact that the inventory *put in evidence by petitioner* concededly does not list merchandise held for others and the fact that *petitioners' own witnesses* specifically and unequivocally admitted the incompleteness of the books, or (b) it regarded the general statements of petitioner's witnesses that the books were complete as sufficient evidence to justify a finding that the clause had been complied with *despite the subsequent specific admissions by the same witnesses that their general statements were not correct.* In either aspect, the Court clearly erred.

The settled rule is that it is the province of the court to decide whether a plaintiff has given evidence *sufficient to support a verdict in his favor,* and if he has not then it is *the duty of the court to direct a verdict against him* (*Pleasants* v. *Fant,* 22 Wall. 116, 120-122; *Improvement Co.* v. *Munson,* 14 Wall. 442, 448; *Bowditch* v. *Boston,* 101 U. S. 16, 18; *Howard* v. *Railway Co.,* 101 U. S. 837, 844; *McGuire* v. *Blount,* 199 U. S. 142, 148; *Western & Atlantic R. R.* v. *Hughes,* 278 U. S. 496, 498; *Gunning* v. *Cooley,* 281 U. S. 90, 93, 94; *Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, 343).* The existence of *some* evidence in the plaintiff's favor is not sufficient to take a case to the jury; the evidence must be *legally sufficient to support a verdict* (Cases just cited; *Herbert* v. *Butler,* 97 U. S. 319, 320; *A. B. Small Co.* v. *Lamborn & Co.,* 267 U. S. 248, 254). "The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed,

*See, also, the able discussion and collection of authorities by Mr. Justice LURTON, as Circuit Judge, in *Mount Adams and E. P. Ry. Co.* v. *Lowery,* 74 Fed. 463, in the opinion in which TAFT, *C. J.*, concurred.

necessarily requires a submission to the jury has met with express disapproval in this jurisdiction as in many others'' (*A. B. Small Co.* v. *Lamborn & Co., supra*). Even where there is conflicting evidence, the court nevertheless should direct a verdict where the evidence is ''so overwhelmingly on one side as to leave no room to doubt what the fact is'' (*Gunning* v. *Cooley,* 281 U. S. 90, 94).

The statements by Wolf and Gorbea that the books were complete (R. 33, 40) are, at best, merely their own inference or conclusion and not testimony as to a fact, and they thus have no greater force than the statements which in *Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, 340, were held to be insufficient to take a case to the jury. Furthermore, after making those general statements, Wolf and Gorbea each gave specific and detailed testimony showing that the books were *not* complete (*supra,* pp. 10-12); and under *Southern Ry. Co.* v. *Walters,* 284 U. S. 190, 194, a verdict should have been directed because their own admissions thus show that their general statements ''have no adequate foundation.''*

Even if regarded at all, those general statements certainly are not more than a *scintilla* or *modicum* of evidence which is wholly swept away by their detailed statements to the contrary; and such general statements, when opposed by detailed statements to the contrary, certainly are not sufficient to support a verdict.

It thus cannot fairly be said that the evidence here is either disputed or conflicting, or even that conflicting inferences may be drawn from the evidence. There is no dispute

*In *Southern Ry. Co.* v. *Walters, supra,* the negligence charged was failing to stop a train and flag a crossing before proceeding over it, and with respect to the testimony of a witness that the train did not come to a stop this court said ''This testimony was shown to have no adequate foundation by her admission that when she first noticed the train the locomotive and several cars had crossed Bond Avenue'' and the court thereupon held that it was *error to refuse to direct a verdict* for the railroad company.

as to what inventory and books were produced. The question is, not what inventory and books were produced, but whether or not those which were produced constitute compliance with the Iron Safe Clause; and certainly it is not allowable for a witness to decide that question by drawing his own inferences from them (*Pennsylvania R. R. Co.* v. *Chamberlain,* 288 U. S. 333, at p. 340).

Whether or not the inventory and books produced constitute a compliance with the clause was a question of law for the court and should not have been submitted to the jury. *Home Ins. Co.* v. *Williams,* 237 Fed. 171, 176, and *Houff* v. *German Ins. Co.,* 110 Va. 585, 591, 592, 594, 66 S. E. 834, specifically so hold as to the Iron Safe Clause. *Gunther* v. *Liverpool Ins. Co.,* 134 U. S. 110, 116, so holds with respect to analogous clauses in insurance policies. See, also, *Southern Pacific Co.* v. *Poole,* 160 U. S. 438, 440; *Upton* v. *Tribilcock,* 91 U. S. 45, 54; *Mosheuvel* v. *District of Columbia,* 191 U. S. 247, 252.

We turn, therefore, to the question whether, as matter of law, there was a compliance with the clause.

As to the *inventory,* the clause, as already stated, requires "a complete itemized inventory of stock on hand" (R. 243). The proper construction of those words plainly and obviously is that the clause requires a complete itemized inventory of the *stock insured,* and the clause has been so construed (*Western Assurance Co.* v. *Kemendo,* 94 Texas 367, 371, 372; 60 S. W. 661; *Dorroh-Kelly Co.* v. *Orient Ins. Co.,* 104 Texas 199, 202, 135 S. W. 1165). An inventory which does not show merchandise held for others as well as merchandise owned, where both are covered by the policy, thus is a partial inventory and not a complete inventory, and hence does not comply with the clause. Such a partial inventory puts the insurance company at a disadvantage in checking other information which is given; and

that is particularly so where, as in this case, the insured's business consists largely of making finished products from materials furnished by others. In some cases, information as to property held for others has a material bearing where other insurance is permitted or where the policy holder is a co-insurer. In some cases it has a material bearing as to the presence of prohibited articles, like gasoline or explosives. It is not necessary, however, for an insurer to show affirmatively that a failure to inventory merchandise held for others actually has caused loss or damage. It is enough that insurers contract for complete inventories; for, using the language of this court in *Imperial Fire Insurance Co.* v. *Coos County,* 151 U. S. 452, 462, 464, it is "immaterial to consider the reasons" why they contract for a complete inventory, and immaterial whether "in the opinion of the court and jury" an incomplete one would serve them just as well.

In *Dorroh-Kelly Co.* v. *Orient Ins. Co.,* 104 Texas 199, 135 S. W. 1165, the inventory totalled $17,588.01, and property of a value of $3,000 or $4,000 was left uninventoried, and it was held to be error to refuse to give a peremptory instruction for the defendant because of non-compliance with a clause identically the same as the one involved in the case at bar. The court there said (104 Tex. 202):

> "Can it be said that an invoice is 'complete', and 'itemized', when it does not contain substantially all of the articles embraced in the stock at the time? The very language itself requires this and while it is true that the omission of unimportant items of little value and consequence would not be sufficient to defeat the right of recovery, yet it must be equally true that when the contract has not been complied with in material respects, the plaintiff can not recover. There was omitted, purposely, from the invoice articles of the value of three or four thousand dollars. This is not insignifi-

cant in any sense. It is not shown by the evidence that there was any means by which the articles so omitted could be established as having existed in the stock at the time the policy was issued. There is no ground upon which the claim of a substantial compliance with the contract can be sustained. The Insurance Company could not tell what was the class, or kind, or value of the different items which were omitted from the inventory. *It is true that the evidence would sustain the claim that the inventory showed that the articles enumerated were of greater value than the total amount of insurance called for, but this was not the information contracted for.* No doubt this was a matter of oversight on the part of plaintiffs in error and works a hardship to them, and we are not able to see from the evidence that it would have been any advantage to the Insurance Company to have had all of the items upon the inventory, but it is not for this court to vary the terms of the contract into which the parties entered nor to speculate as to what might or might not have been the consequences if the contract had been differently expressed. Parties make their own contracts and it is not within the province of this court to vary their terms in order to protect them from the consequences of their own oversights and failures in non-observance of obligations assumed."

In *Hanover Fire Ins. Co.* v. *Moore,* 280 S. W. 538 (Tex. 1926), the court, after referring to the preceding case, said (p. 540):

> "This decision has never been questioned in any way. It is in harmony with other jurisdictions and the text-book writers."

As to the absence of a *stock book or cash book,* the authorities are equally emphatic.

In *Home Ins. Co.* v. *Williams,* 237 Fed. 171, 175, 176 (5 C. C. A.), it was held that such a bank statement as was

produced by petitioner was not a compliance with the clause even though it showed, in addition, the names of the persons to whom the checks were payable.

In *Everett-Ridley-Ragan Co.* v. *Traders Ins. Co.*, 121 Ga. 228, 48 S. E. 918, it was said (p. 229):

> "A cash-book which only shows the amount of cash taken in at the end of each day, giving *no indication of the source from which the cash is derived,* whether from cash sales, from the payment of past-due bills, or what not, can in no sense be considered 'a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit'."

The case of *Scottish Union Ins. Co.* v. *Virginia Shirt Co.*, 113 Va. 353, 74 S. E. 228, is particularly applicable because of the similarity of the nature of the business conducted by the plaintiff in that case and the plaintiff in this case. The court there said (pp. 361, 362):

> "The plaintiff was conducting a large shirt and overall manufacturing business, and without such a compliance with the requirements of the policy as furnished a complete record of the business transacted, *distinguishing between the kinds of goods used, the kinds of garments manufactured, the quality of goods used in making them, the sales and shipments of the manufactured garments, as well as the purchases of material actually made, the goods converted into the garments sold and shipped,* there is no room for a difference of opinion among reasonably fair-minded men that there has not been a substantial compliance on the part of the plaintiff with the obligations imposed upon it by its policy."

Similarly, in *Wright* v. *Union Ins. Co.*, 13 Fed. 2d 612 (5 C. C. A.), it was held that a verdict was properly directed where the day book in which sales on credit were recorded in detail was lost and the ledger, to which the day

book was posted, merely described the goods sold as groceries, dry goods, or hardware. The court stated that the clause in question is satisfied if the books are kept in such manner as to enable a person of ordinary intelligence, accustomed to accounts, to refer to the books and *ascertain therefrom the amount of goods on hand at the time of the fire* (p. 613). But it then added (pp. 613, 614):

> "The entries of credit sales in the ledger are clearly insufficient for that purpose, as the amount of goods sold under the general description is not shown. Nor is it possible to ascertain that amount, so as to arrive at what was left on hand, by including in such entries the prices charged upon the credit sales that were made. A charge made and entered indicates nothing without a description of the goods. Only by such description is it possible for an accountant to discover whether the goods were sold at, above, or below cost or value. If plaintiff sold at a loss, the stock of goods destroyed by fire was smaller than it would have been if he had sold at cost, or at a profit. On the other hand, if he sold at a profit, his stock was larger than it would have been if he had sold at cost, or at a loss. It follows that the books produced in evidence failed to disclose the extent of plaintiff's loss.
>
> "It was not permissible for plaintiff to show by his oral testimony that he sold at a profit, because the parties stipulated that the books should present a complete record of business transactions, including all sales."

POINT II.

Petitioner's own evidence likewise establishes that its claim was fraudulent, and for that additional reason a verdict should have been directed for respondent.

In the opinion delivered upon the first hearing—written by the judge who dissented from the court's final decision—it is stated that according to respondent's evidence petitioner's books "showed clear indications of having been fabricated" (R. 317). But because petitioner's witnesses testified that they were honestly kept and that the proofs of loss conformed thereto and were honest, it was concluded that it cannot be said that the evidence "so clearly established fraud on the part of the plaintiff that the defendant was entitled to a directed verdict on that ground" (R. 317).

No discussion of the evidence appears in the opinion, and the fact that the evidence of fabrication of books and of fraudulent exaggeration of the claim appears *in petitioner's own evidence* was overlooked or ignored. There, again, therefore, we submit that the court failed to follow the rule with respect to directing verdicts which this court repeatedly has laid down. (See cases cited at pp. 24, 25, *supra.*)

It may be noted in passing that we find in the record no testimony by any witness that the claim was "honest", as is stated in the opinion at R. 317. But even if there were, the only theory upon which such testimony could be regarded as sufficient in itself to justify a refusal to direct a verdict is the "scintilla rule" which this court definitely and repeatedly has rejected. The duties of judges would be light indeed, and they rightly would be termed "mere moderators" (*Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S.

658, 660), if cases were to be submitted to juries merely because some witness asserted his honesty.

We do not ask that the court resolve a conflict of evidence. We *do* ask that the *probative force of petitioner's own evidence* be analyzed.

That evidence has been set forth at pages 12 to 21, *supra,* and without rehearsing or commenting upon it here we submit that it clearly and patently is insufficient to sustain a verdict for petitioner. Even if all else be laid aside, the claiming of $14,835.10 for machinery and accessories (R. 253, 254) in the face of an actual inventory showing those items plus others at only $9,869.92 (R. 279, 280), was plainly fraudulent; and under the rule stated in the cases cited at pages 24, 25, *supra,* it was error to refuse to direct a verdict for respondent.

The Circuit Court of Appeals itself finally arrived at that conclusion with respect to petitioner's claim as to "cost of labor", and correctly found that, as the evidence established fraud in respect of that item, petitioner had forfeited all claim under the policy and a verdict should have been directed for respondent (R. 336, 337).

The judge who wrote for the court upon the first hearing dissented from that view (R. 338-340), and in his dissenting opinion made several statements the error in which we now desire to point out.

He referred to the testimony of Gorbea, the accountant who examined petitioner's books after the fire but who had no previous connection with petitioner, and said that that testimony substantiated the item in question (R. 338). But Gorbea merely testified to the item on the books of *goods in process* (R. 338, 35, 36, 37), and the learned judge seems to have been utterly oblivious of the manifest difference between *goods in process* and *cost of labor on*

goods in process. With that confusion in his mind, it is not surprising that he failed to grasp the significance of the testimony referred to in the prevailing opinion at R. 338. The point of the matter is that, whereas the books showed "goods in process $2,524" as testified by Gorbea at R. 35, 36, 37, the proof of claim claimed $2,524.50 for "labor on goods in process" *in addition to* other amounts for raw materials and manufactured and unmanufactured goods (R. 253), and Rivera Soler's testimony established that the $2,524 shown on the books was *neither* cost of labor *nor* goods in process but, on the contrary, was the contract price petitioner was to receive for goods manufactured and sold and included overhead expenses and profit (R. 110, 116, 117, quoted at p. 13, *supra*).

The dissenting judge made the further statement that "There is no evidence that Soler was making any profit on this work, or did not take it at cost" (R. 340), which is quite remarkable and plainly erroneous because Soler's own testimony is that in the item of cost of labor he included "overhead expenses *and my profit*" (R. 117)—testimony to which the dissenting judge did not refer although he quoted other parts of Soler's testimony at length (R. 339). How could Soler have acted honestly, as suggested by the dissenting judge, when he swore in the proof of loss that no profit was included (R. 252) and yet knew that the $2,524.50 claimed therein was contract price including profit?

The dissenting judge finally wound up with the statement "Apparently, this item was fully supported by the vouchers which were not put in" (R. 340). Since when, however, can a claim be supported by documents which not only are not put in evidence but actually were excluded from evidence because not connected (R. 38)?

The court's final decision that the evidence established fraud and entitled respondent to the direction of a verdict clearly was correct and should be affirmed.

POINT III.

The jury's verdict constitutes a finding that petitioner asserted a fraudulent claim, and under that finding it is respondent, not petitioner, which is entitled to judgment.

Under Condition 12 of the policy all benefit under it is forfeited if the insured's claim thereunder "be in any respect fraudulent" or if "any false declaration be made or used in support thereof," or if "any fraudulent means or devices" be used to obtain a benefit under the policy (R. 248; *supra*, p. 8).

The settled rule with respect to such provisions is that any false statement knowingly and willfully made with respect to any matter material to the insurance avoids the policy (*Atlas Assurance Co.* v. *Hurst*, 11 Fed. 2d 250, 251; *Columbian Ins. Co.* v. *Modern Laundry*, 277 Fed. 355, 360); and that includes an oath as to values in a proof of loss, because such an oath is "a sworn estimate of value by one having special knowledge of the property made with intent that the other party, ignorant on the subject, and with unequal means of information, should rely upon it to his injury" (*Orenstein* v. *Star Ins. Co.*, 10 Fed. 2d 754, 757).

Confining ourselves, for the moment, to what appears from the pleadings, verdict, and judgment, as did the Circuit Court of Appeals, the situation, in brief resumé, is this:* Petitioner's proof of claim listed various items of property which it asserted were owned and destroyed and fixed the

*The policy is a part of the complaint as Exhibit A thereof (R. 3) and the proof of claim is a part thereof as Exhibit B (R. 3).

value thereof at $35,926.06 (R. 253-255). That amount is stated to be the cash value of the property at the time of the fire without including any profit (R. 252). The property enumerated is all property of an ordinary sort—sewing machines, shelves, cloth, thread, and the like—with nothing unique or extraordinary about it (R. 253-255). It also is property used in the business of a corporation, and it was the duty of the officers of that corporation to know the nature and value of its property, and there thus is a presumption that they knew it. The statement is signed by Rivera Soler (R. 255). The statement as to the *nature and value* of the property is repeated in the complaint (R. 3), which was sworn to by Rivera Soler (R. 4). In that complaint, judgment for the full face of the policy, $30,000, is demanded (R. 4). Respondent in its answer denied both the existence, ownership, and destruction of the property as to which indemnity was so sought and the alleged values thereof (R. 5, 6). Despite that challenge, the claim was persisted in. A mistake of $1,092 was conceded upon the trial (R. 36), but with that exception the claim was pressed as originally made and was attempted to be supported by sworn testimony. The jury's verdict assessed petitioner's damages at $17,000 (R. 12, 23, 24).

That, of course, was the jury's finding as to the value of the property destroyed. The value so found by the jury is thus less than half the amount which petitioner had sworn to, and not much more than half of what it had tried to collect. Stated in terms of dollars, the verdict is $13,000 less than it would have been if property worth the amount sworn to, or even within $5,926.06 of the amount sworn to, had been in fact destroyed. That is, if the jury believed that property worth either the $35,926.06 sworn to or any other amount down to $30,000, had been destroyed, then the verdict would have been for $30,000, whereas it was for

only $17,000. Stated in still another form, the jury found that property of an extremely ordinary and staple sort, having no unique characteristics or unusual elements of value, was worth $18,000 less than had been stated in the proof of claim.

Under these circumstances, it cannot be doubted, we submit, that the verdict necessarily imports a finding that the claim was in some respect fraudulent, that some false declaration had been made or used in support of it, and that some fraudulent means or device had been used to obtain a benefit under the policy; and numerous courts have held that such a verdict must be so regarded.

In *Sternfeld* v. *Park Fire Ins. Co.*, 50 Hun 262 (N. Y. Sup. Ct., General Term, First Dept.), in which the defense was fraudulent overvaluation, the court said (pp. 264-266):

> "The jury, by their verdict, found in favor of the plaintiffs for the sum of $750, being half the amount of the defendant's policy. To render this verdict the jury must have reached the conclusion, as the whole insurance did not exceed the sum of $10,000, and it was to be divided and equally proportioned between the companies whose policies were issued upon the property; that the whole loss of De Vulder by the fire amounted to no more than the sum of $5,000. This left an over-statement in his proofs of loss of $18,342.47. *To that extent the jury must necessarily have assumed that the proofs of loss were untruthful.* Neither the evidence of De Vulder, nor that of any other witness, tended to explain this difference on the ground of any mistake or misapprehension concerning either of the facts upon which the proofs were made and verified; and, as there was no ground from which it could be inferred that the loss had been overstated in this manner by mistake, there was reason for assuming that it had been fraudulently made to defraud the insurance company out of the other half of

the amount of the policy. *Such an inference necessarily follows from so great a difference.* The loss in this manner had been stated by the assured to an amount exceeding three-fifths of what had actually been sustained; and it is not to be supposed or presumed that it could have been so over-stated by any mistake intervening in the statements presented by the proofs. But the inference is direct and plainly to be drawn from this difference, that De Vulder must have known that this statement was untruthful, and his affidavit verifying it was false, and from that the conclusion follows, that it was intended thereby to defraud the insurance company; and this inference is materially strengthened by the fact that the preceding inventory of De Vulder's stock, taken in January, 1884, amounted to no more than the sum of $20,478.13, and his business afterwards was not prosperous, and the fire, causing the loss, was of very short duration and confined only to a portion of the store.

"In *Boynton* v. *Andrews* (63 N. Y. 93), property had been taken by a manufacturing corporation for which it had issued its stock. The property was proven to have been worth no more than fifty per cent. of the amount for which it was received by the company and its stock was issued. *And from this difference the court held that the law would assume the transaction to be fraudulent, leaving no question of fact as to the intent to be passed upon by a jury.* Applying the principle of that decision to this case and the inference is much more strongly sustained that there was an intent to deceive and defraud the company by this over-statement of the loss of the assured. *And that the over-statement existed is clear from the verdict of the jury, which proceeded upon the conclusion that the actual loss did not exceed the sum of $5,000. This could have been adopted on no other view of the evidence than that the assured had over-stated his loss to the exent of upwards of $18,000.* And upon that fact necessarily

> entering into the case, from the verdict which the jury have rendered, *they should, instead of finding for the plaintiff any sum of money, have found in favor of the defendant*, for the policy had provided that, 'any fraud or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent, in any examination or in the proof of loss or otherwise, shall cause a forfeiture of all claim on this company under this policy, and in such case this company shall have the right at any time to require the same to be delivered up to be canceled.' *Under this provision this fraudulent overstatement of the loss forfeited all claim to indemnity upon the policy and entitled the company to a verdict against the plaintiff.*"

In *Domagalski* v. *Springfield Fire & Marine Ins. Co.*, 218 N. Y. App. Div. 187, in which again the defense was fraudulent overvaluation, the plaintiff claimed $22,761.10 in his proof of loss and his testimony at the trial, and the jury found in his favor for $5,000, and in an opinion by Presiding Justice HUBBS, now Judge HUBBS of the New York Court of Appeals, which was concurred in by Mr. Justice CROUCH, who, also, is now a Judge of the New York Court of Appeals, the Court said (pp. 189, 190):

> "*Juries are prone to disregard a defense based on the clause in question and no doubt justify such action on the ground that the insurance company will not be injured if the verdict does not exceed the amount of the actual damage suffered. There is no justification in law for such conduct.* When the insurance company establishes that the statements made were relevant, material and intentionally false it has established its defense. It is not required to assume the burden of convincing a jury that it has been injured by such statements. If it appears that a plaintiff has willfully and fraudulently placed in the proofs of loss a statement of

> property lost which he did not possess, or has placed a false and fraudulent value upon the articles which he did own, he is not entitled to recover anything."

In like manner, in *Riley* v. *Aetna Ins. Co.*, 80 W. Va. 236, 92 S. E. 417, L. R. A. 1917 E. 983 and *Hiller Co.* v. *Insurance Co. of N. A.*, 125 La. 938, 52 So. 104, the jury found for the insured for about half the amount claimed, and in each case it was held that the judgment entered upon the verdict should be reversed because of fraudulent overvaluation.

In *Levy* v. *Baillie*, 7 Bing. 349 (1831), the plaintiff made affidavit that his loss was £1085 and the jury found in his favor for £500; and defendant's rule for a new trial on the ground that such verdict "*amounted in effect to a verdict for the defendants* under the condition which avoided the policy if there were any fraud or false swearing in the plaintiff's claim" was *made absolute.*

In *McLeod* v. *Citizens' Ins. Co.*, 13 Nova Scotia 21, it was said (pp. 27, 28):

> "The second jury found a verdict for $2000, of which we must assume one-half to go for the machinery, leaving $1000 for the mill, that is, one-third of what the plaintiffs swore it was worth, and one-half of what they insured on it. This of itself is an index of fraud under the decision in Levy *v.* Baillie, 7 Bing. 349."

and judgment was there ordered for the defendant despite the jury's verdict for the plaintiff.

Each of the six cases last cited proceeds upon identically the same principle which was applied by the Circuit Court of Appeals in the case at bar, *viz.*, that the verdict itself imports a finding that the plaintiff's claim was fraudulent; and we submit that that court was clearly right in its final conclusion (R. 336):

"It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegations of the complaint and the proof of loss, and we think this disparity of nearly $18,000 shows on its face and as matter of law that the sworn proof of loss was fraudulent and, if so, then, under the 12th condition of the policy, all benefit thereunder was forfeited. The verdict should have been either for nothing or in the neighborhood of $30,000."

The same principle was applied in *Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, in which the jury in a personal injury case found in *favor* of the employee-driver and *against* the employer-owner. The New York Court of Appeals there said (pp. 233-234):

"*We think the verdict as a whole was equivalent to one finding no cause of action against the appellant.* * * * The appellant's liability was purely of a derivative or secondary character on the theory of *respondeat superior,* and when the jury found that the employee was free from tortious conduct or that the plaintiff was guilty of contributory negligence, *the facts were settled which necessarily led to a verdict of immunity so far as appellant was concerned,* and the verdict should have been in its favor. *There was then left no support for or consistency in a verdict against the employer.*

When the jury took its improper and unwarranted course, nevertheless, of rendering a verdict against it, a situation was presented somewhat analogous to the one which arises where inconsistent findings have been made or *where a jury has found a general verdict which is inconsistent with special findings,* and in determining whether the judgment is supported and authorized we think that the appellant is entitled to have applied the principles which give to an appellant the benefit of the most advantageous of the inconsistent findings (*Whalen* v. *Stuart,* 194 N. Y. 495), or which make the

special findings superior in effect to the general verdict (Code, § 1188), *and thus to have the award of damages against it controlled by and yield to the verdict and findings that the facts did not exist which justified such an award of damages.*"

The facts which entitle the insurance company to judgment, viz., the assertion of a fraudulent claim, having been established by the verdict, the situation obviously was not one in which respondent should be forced to move for or to submit to a new trial (see authorities cited in Petition for Rehearing at R. 326, 327). On the contrary, it became the duty of the court to award the relief which the law requires upon those facts, *i. e.*, to direct that judgment upon the verdict be arrested (*Slacum* v. *Pomery*, 6 Cranch 221, 225; *Cragin* v. *Lovell*, 109 U. S. 194, 199, 200.)

Petitioner has cited a number of cases which it claims to be to the contrary, but an examination of them will instantly reveal that none of them presented the situation presented in the case at bar and that no conflict exists.

Insurance Companies v. *Weides*, 14 Wall. 375, which is particularly relied upon, holds nothing more than that whether or not there has been such fraud or false swearing as voids a policy is a question of fact which *ordinarily* must be submitted to the jury.* In the case at bar that question *was* submitted to the jury, and what the Circuit Court of Appeals has held is, not that it was error to submit it, but that where the jury finds for an amount grossly disproportionate to the amount sworn to, its verdict necessarily im-

*Other cases in this court recognize that it sometimes is proper to direct a verdict for the insurer even upon that question: *Hermanos* v. *Royal Exchange Assurance Co.*, 277 U. S. 590, denying petition for certiorari to review 23 Fed. 2d 270; *Gunther* v. *Liverpool Ins. Co.*, 134 U. S. 110, 116; *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, 254.

ports a finding of fraudulent overvaluation and consequently in legal effect is a verdict for the defendant and does not justify the entry of judgment thereon in favor of the plaintiff.

In *Mack* v. *Lancashire Ins. Co.*, 4 Fed. 59, upon which petitioner also lays considerable stress, the question was submitted to the jury, but the report does not show what the jury found or what judgment was entered upon its verdict.

Spring Gardens Ins. Co. v. *Amusement Syndicate Co.*, 178 Fed. 519, was tried before a *master*, who specifically found that the proof of loss was made in good faith and not with any view to deceive (p. 531).

In *Great American Ins. Co.* v. *Roney & Berger Co.*, 42 Fed. 2d 816, the jury's verdict was for *the total amount of the policy sued on* and thus indicated, as pointed out by the court, "a loss of true values equal to or more than the amount of the verdict" (p. 818).

In *Camden Fire Ins. Ass'n.* v. *Penick*, 2 Fed. 2d 964, the verdict and judgment were based on the loss of 788 bales of cotton, which was *the identical amount claimed in the amended complaint.*

Atlas Ins. Co. v. *Hurst*, 11 Fed. 2d 250, must be read in connection with *Connecticut Fire Ins. Co.* v. *Hurst*, 11 Fed. 2d 254, because they were companion cases arising out of the same fire, and the total of all the judgments was $24,182.52 on policies aggregating $27,000.

In *National Fire Ins. Co.* v. *Renier*, 22 Fed. 2d 671, the report does not disclose either the amount claimed or the amount awarded.

In *Globe & Rutgers Fire Ins. Co.* v. *Stallard*, 68 Fed. 2d 237, a judgment in favor of the insured was reversed because of errors in the charge, and all that actually was held

was that in the face of conflicting evidence as to the value it was proper to submit the case to the jury.

American Central Ins. Co. v. *Harmon Knitting Mills*, 39 Fed. 2d 21, was an *equity case* in which there was a specific finding of absence of intent to defraud.

The dissenting judge argued that fraud means conscious dishonesty and is a matter of fact (R. 337). That of course is true, but immaterial; for conscious dishonesty as matter of fact may be inferred from circumstances as well as established by direct evidence.

The dissenting judge further argued that even an overvaluation of as much as one-half might be the result of honest mistake or honest difference of opinion (R. 338). But assuming *arguendo* that that conceivably may be so with respect to certain types of property—art objects, gold mines, oil wells, and the like—it certainly is indulging in fantasy at the expense of reality to say that it is true with respect to sewing machines, thread, and such other articles as are here involved. And even if it be assumed that the ordinary householder may honestly overvalue his household furniture, there certainly can be no presumption that officers of a corporation are ignorant of the nature and value of the property which they are actually using in the conduct of the business of the corporation. It is their duty to know and there is a presumption that they do know. Furthermore, the dissenting judge overlooked the fact that the question is not simply one of fixing the value of articles concededly destroyed. Another, and perhaps still more important element, is whether all the articles for which indemnity was claimed actually were owned and were destroyed. The jury's verdict imports, not merely gross

overvaluation of property concededly owned and destroyed, but, also, a fraudulent claim as to what property was owned and destroyed.

The dissenting judge next suggested that it should be assumed that the jury were properly instructed that fraudulent statements in a proof of loss would entitle the respondent to a verdict, and that upon that theory the verdict involved a finding that the proofs of loss were not fraudulent (R. 338). There are two vices in that suggestion. One is that it assumes that juries always follow instructions, whereas we know that, particularly in cases of this kind, they are "prone to disregard" the defense of fraudulent claim upon the theory that they are doing substantial justice if they give the insured what he actually lost instead of what he fraudulently tried to get (see quotation from Judge HUBBS, at pp. 38-39, *supra*). Another vice in the suggestion of the dissenting judge is that it wholly and completely ignores the inescapable fact that the jury did fix the damages at $17,000, which is utterly inexplicable upon the theory he suggests that they found no overvaluation.

The dissenting judge next says that if the verdict be regarded as inconsistent, the point should have been brought to the attention of the trial judge on a motion to set the verdict aside (R. 338). That, however, is but a reversion to the untenable position he took upon the first hearing that the point could not be considered in the absence of such motion and an exception (R. 317, 318). There certainly was no reason why respondent should move to set aside a verdict which it claimed established the fact which entitled it to judgment (*Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, cited in petition for rehearing at R. 326). Furthermore, the question whether the verdict authorized a judgment in petitioner's favor necessarily was presented to and ruled upon by the trial judge when he "ordered that

judgment in accordance with the verdict of the jury be entered" (R. 24), for in directing judgment upon a verdict such question always is presented (see *World's Columbian Exposition Co.* v. *Republic of France,* 91 Fed. 64, cited in petition for rehearing at R. 323 and 325).

The dissenting judge next posed the question "How can we say that the error in the verdict—if there was one—did not consist in awarding inadequate damages on an honest claim, rather than awarding any damages on a dishonest one?" (R. 338). The practical and conclusive answer to that is that petitioner has not at any time or in any form asserted that the verdict is inadequate.

The dissenting judge also asserts broadly that the question whether or not the jury's verdict constitutes a finding of fraudulent overvaluation necessarily involves an examination of the evidence (R. 338). That suggestion merits serious consideration, for if well founded a serious defect in our legal machinery, a serious impediment to the administration of justice, has been discovered.

Let us recapitulate the situation: A trial of issues of fact, duly framed upon proper pleadings, proceeds without error, we assume, down to the rendition of a verdict. That verdict, let us assume, is of the kind described in *Pangburn* v. *Buick Motor Co.,* 211 N. Y. 228, 231, as "the result of confusion or misplaced sympathy and logic" and "inconsistent and absurd and contrary to the instructions." Nevertheless, the trial judge enters judgment upon it. What is the remedy of the party against whom that judgment is entered? The granting of a new trial is discretionary with the trial court and a denial thereof cannot be reviewed on appeal. The only remedy is an appeal from the judgment. There is no such thing as an exception to a verdict. There is no such thing as an exception to a judgment. There is nothing to incorporate into a bill of ex-

ceptions. Can it be possible that, as the dissenting judge suggests, the appellate court is powerless to afford relief? If so, we repeat, a serious defect of procedure has been discovered. For if the evidence cannot be considered, and if the question whether or not the verdict supports the judgment cannot be considered without considering the evidence, then the appellate court is powerless and the right of review is effectually emasculated.

The problem above stated is the precise problem which confronted the court in *Pangburn* v. *Buick Motor Co., supra,* and it solved the problem by holding that, despite the general rule that all questions must be presented by exception, the question whether a verdict supports a judgment may be reviewed on appeal from the judgment without any exception because there has been no opportunity to take one (211 N. Y., p. 235).

Upon an appeal taken under such a situation as we have above described, we are very far from saying that the appellate court could not consider the evidence if actually incorporated in the record by a bill of exceptions taken upon some other point than whether the verdict supported the judgment. In fact, we think the Circuit Court of Appeals went too far in limiting itself to the strict record. We think it very well might have considered the evidence. Of course it could not do so for the purpose of reexamining any issue of fact, but we see no reason why it might not look at the evidence for the purpose of illuminating and interpreting the verdict and for the purpose of ascertaining whether there was any possible explanation other than that of actual fraud—just as appellate courts sometimes look to the opinion of a trial court for the purpose of explaining or interpreting its judgment.

If such examination of the evidence be made in this case, the possibility of honest mistake is of course at once

excluded and the palpable and intentional fraud stands out in all its brazen effrontery.

POINT IV.

The Circuit Court of Appeals was right in directing that judgment upon the verdict be arrested.

It was not necessary for it to award a new trial.

In a brief submitted by petitioner since certiorari was granted the contention is made that under *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, the Circuit Court of Appeals should have awarded a new trial instead of directing an arrest of judgment.

A sufficient answer to that contention would seem to be that in the subsequent case of *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511, an objection to the action of the Circuit Court of Appeals in reversing a judgment without remanding for new trial was disposed of as follows (pp. 515, 516):

> "There was no objection made to that action and no request for a remand of the case. And besides there was nothing to retry. The case involves only propositions of law."

Those remarks of this court are equally applicable here.

We note, also, that in *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, 195, the court, in holding that it was error to refuse to direct a verdict, merely reversed and remanded "for further proceedings in conformity with this opinion" (p. 195), and did not say that a new trial should be had.

It perhaps nevertheless is appropriate to consider the matter further.

In the same month in which what became the Seventh Amendment was submitted to the States, the same Congress which framed and submitted it also passed the Judiciary Act of 1789, in which it was enacted that

> "when a judgment or decree shall be reversed in a circuit court, such court shall proceed to *render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein,* except where the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision." (1 Stat. 85, sec. 24.)

If, therefore, the rendition of final judgment upon reversal be an infraction of the Seventh Amendment, then an infracting statute was enacted by those who framed and submitted the amendment and almost literally at the same moment that they framed and submitted it. We suggest that that seems improbable.

The framers of the statute and of the amendment were acquainted with the common law. They were brought up within it and were more imbued with its spirit than we of this age can become by reading the ancient reports (Compare *Diaz* v. *Gonzalez,* 261 U. S. 102, 106). They also were particularly concerned about the right of trial by jury and particularly solicitous about preserving it. They had no thought of limiting it. They were preserving it, not only in the proposed amendment to the Constitution, but, also, in the statute itself.

In Sections 9, 12 and 13, they had made three specific provisions for trial by jury (1 Stat. 77, 80, 81). In Section 17 they had provided that in cases where there had been a trial by jury all the courts of the United States

should have power to grant new trials "for reasons for which new trials have usually been granted in the courts of law" (1 Stat. 83). In Section 22 they had limited the review of judgments and decrees to a review *upon writ of error* and had expressly provided that there should be no reversal "for any error in fact" (1 Stat. 84, 85). That was a drastic limitation upon appellate jurisdiction as then generally exercised, and the limitation was made in pursuance of a purpose to preserve the existing right of trial by jury.*

*Charles Warren, in an article "*New Light on the History of the Federal Judiciary Act of 1789*" published in November, 1923, says (37 Harvard Law Review 49, 75, 102):

> "The anxiety to preserve the right of jury trial was shown by the insertion by the Senate, at the end of Section 9 of the Act: 'and the trial of issues in (*sic*) fact in the District Court, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury.'" (p. 75.)
>
> "That the drafters of the Act had taken warning by the violent and reiterated attacks made upon that portion of the Constitution which vested the Supreme Court with appellate jurisdiction 'both as to law and fact,' and were exceedingly anxious to allay the fears of those who saw in this provision a determination to abolish jury trial and to adopt a system of civil law appeals, is seen from the provision which they made in Sections 21 and 23 of the Draft Bill (Sections 22 and 25 of the Act), with reference to appellate jurisdiction; for they restricted it in a more drastically extreme manner than even the opponents of the Constitution had advocated. Most of such opponents had admitted that an appeal as to facts as well as law was warranted in admiralty and in equity cases, and that such an appeal in those classes of causes would not be in violation of the common law jury system. Appeals as to fact in admiralty cases already existed in the Federal Court, under Acts of the Continental Congress and of the Congress of the Confederation, and were recognized as proper in many of the State Courts. Appeals as to fact in equity cases also were already recognized in those States which had Courts of Chancery. But the drafters of the Act now determined that there should not be an appeal on questions of fact in *any* class of cases; and they provided for appellate jurisdiction from the Circuit to the Supreme Court only on 'petition in error' ('petition in error' being an anomalous term, which was changed to 'writ of error' by amendment in the Senate), presenting only questions of law for the determination of the appellate Court. This provision later caused great trouble and inconvenience in equity and admiralty appeals; but it was not altered for fourteen years, when, in 1803, an Act was passed by Congress, providing for appeals in equity and admiralty cases, instead of writs of error; and thus the courts were given power to pass upon the facts as well as the law in such cases, and their power in this direction was still further enhanced by a provision that in such cases they might even hear new evidence." (pp. 102, 103).

In the same article it also is pointed out that the Judiciary Act and the proposed amendments to the Constitution were kept before Congress and considered practically simultaneously because of the bearing of each upon the other (37 *Harvard Law Review* 111 *et seq.*).

Considering the history of the times, therefore, we suggest the great improbability that it ever occurred to any of those concerned in the adoption of the Seventh Amendment that the rendition of final judgment by an appellate court upon reversing a judgment of a lower court was any infraction of the right of trial by jury.

The fact that a provision that there should be no re-examination of the facts in any appellate court (Sec. 22, at p. 49, *supra*) was accompanied by a provision that upon reversal the appellate court should render such judgment as the court below should have rendered (Sec. 24, at p. 48, *supra*), seems to us to point to the conclusion that, in the minds of the framers of the statute and of the Seventh Amendment, with all their knowledge of the common law and their desire to preserve trial by jury inviolate, *the rendition of final judgment by the appellate court upon reversal does not constitute a re-examination of the facts.*

The practice followed in some early cases seems to us to be a further indication to that effect. In *Wilson* v. *Lenox*, 1 Cranch. 193, judgment for the plaintiff was entered upon a verdict, and upon writ of error from this court judgment was "reversed and arrested" (p. 211). In *Fenwick* v. *Sears*, 1 Cranch. 259, there was a general verdict for the plaintiff and a judgment accordingly, and this court reversed the judgment and directed that judgment be rendered for the defendant (p. 281). In *Thomson* v. *Jameson*, 1 Cranch. 282, judgment for the plaintiff was entered upon a verdict despite defendant's motion in arrest of judgment, and this court simply reversed the judgment. In *Mandeville* v. *Riddle*, 1 Cranch. 290, judgment for the plaintiff was entered upon a verdict, and this court, being of the opinion that the action was not maintainable, simply reversed the judgment. In *Marine Ins. Co.* v. *Young*, 1 Cranch. 332, there was a verdict for the plaintiff on one count and for the defendant on

another, and judgment for the plaintiff was entered despite a motion in arrest of judgment, and this court "reversed the judgment and ordered it to be arrested" (p. 342). In *Dunlop* v. *Ball,* 2 Cranch. 180, this court held that the lower court had erred in instructing the jury with respect to a plea of payment and remanded the case for trial "with directions that there is no presumption of payment." In *United States* v. *Cantrill,* 4 Cranch. 167, there was a verdict of guilty, and upon a certificate of division of opinion whether judgment on the verdict should be arrested this court directed that judgment be arrested. In *Lewis* v. *Harwood,* 6 Cranch. 82, there was a verdict and judgment for the plaintiff, and this court, holding that the bond sued upon was not assignable, reversed the judgment and directed that judgment on the verdict be arrested. In *Hughes* v. *Mohr,* 7 Cranch. 176, there was a verdict and judgment for the plaintiff, and this court, holding that certain pleas were good and that demurrers thereto should have been overruled instead of sustained, reversed the judgment and rendered judgment for the defendant. In *Page* v. *Bank of Alexandria,* 7 Wheat. 35, there was judgment for the plaintiff on a demurrer to the evidence, and this court, holding that "*there not being sufficient evidence to support the second count,*" reversed the judgment and directed the entry of judgment for the defendants. In each of the following cases this court reversed judgments entered upon *special verdicts* and directed the entry of judgment for the opposite party: *Hooe* v. *Groverman,* 1 Cranch. 214; *Fitzsimmons* v. *Newport Ins. Co.,* 4 Cranch. 185; *Otis* v. *Walter,* 11 Wheat. 192; *Comegys* v. *Vasse,* 1 Pet. 193; *Bank of Alexandria* v. *Swann,* 9 Pet. 33; *McCool* v. *Smith,* 1 Black 459. In *La Roche* v. *Jones,* 9 How. 155, there was a verdict subject to the opinion of the court and the trial court ordered judgment for

the plaintiff, and this court reversed and ordered judgment for the defendant.

In none of those cases was there any discussion of the practice, the practice apparently being assumed as well known and unquestionably correct. But in 1870, in *Insurance Companies* v. *Boykin,* 12 Wall. 433, discussion was evoked and this court specifically stated that the rule prescribed by Section 24 of the Act of 1789 was "*the rule by which courts of error were governed at the common law.*"

In that case of *Insurance Companies* v. *Boykin* the early debate in England as to what court should render judgment upon reversal, and the final establishment of the rule that "the House of Lords should give the judgment which the Kings Bench ought to have given", was adverted to at some length and with the citation of several authorities; and with reference to Section 24 this court then said (p. 439):

> "The provisions of our statute of 1789, already cited, show that the lawyers who framed it were familiar with the doubts which seemed at that time to beset the courts in England as to the precise judgment to be rendered in a court of errors on reversing a judgment, and they in plain language prescribed the rule which has since become the settled law of the English courts on the same subject."

The facts in *Insurance Companies* v. *Boykin* were that four companies, each liable for one-fourth of the total policy, had been sued in one action by their consent, and the jury found that "said defendants did promise and assume as the said plaintiff hath alleged" and assessed the damages at the face amount of the policy. Upon that verdict the Circuit Court entered a judgment for that amount against all defendants jointly. This court, upon writ of error, reversed the judgment of the Circuit Court *but directed the*

proper judgment and did not award a new trial. The court said (pp. 437, 438):

> "The judgment of the court, therefore, which is against the defendants jointly and not severally for the full amount of the policy, with interest, is erroneous and must be reversed.
>
> "But this error does not extend to the verdict. * * * The Circuit Court ought to have rendered a judgment that plaintiff recover of each of said defendants, severally, a sum which would have been the one-fourth part of the $10,000, and interest from the time mentioned in the verdict, and a joint judgment against all the defendants for costs. While we are bound, therefore, to reverse the judgment of that court the foregoing statement indicates very clearly the judgment which this court must render under the twenty-fourth section of the Judiciary Act. * * * , *it is our duty to render the judgment which we have shown that the Circuit Court should have rendered.* The process, the pleadings, the trial, and the verdict are without error, and it surely cannot be necessary to set aside this verdict and award a new trial because the judgment which was rendered on that verdict was erroneous. *And this was also the rule by which courts of error were governed at the common law.*"

In 1872 Congress passed "An Act to further the administration of justice" which embodied numerous provisions as to procedure, one of which was that "The appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, OR *may direct such judgment, decree, or order to be rendered,* OR such further proceedings to be had by the inferior court as the justice of the case may require" (Act of June 1, 1872, 17 Stat. 197). And that statute was considered by this court in *Insurance Company* v. *Piaggio,* 16 Wall. 378 (1872). In that case the jury found for the plaintiff for the full face amount

of the policy "and the further sum of $5000. damages", and judgment to that effect was entered by the Circuit Court. This court, upon writ of error, held that the damages were not recoverable and accordingly reversed the judgment, but *specifically declined to award a new trial* and, on the contrary, remanded the case with directions to enter a judgment for the proper amount. The court there said (pp. 387, 388):

> "Errors of the kind, it is insisted by the defendants, necessarily require that a new *venire* shall be ordered, but the act of Congress to further the administration of justice (17 Stat. at Large, 197) provides that the appellate court may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require; and in view of that provision the court is not inclined to adopt the course suggested by the defendants, as it would lead to unnecessary delay and expense.
>
> "Verdicts, it is said, are either general or special, and that if there is error in a case where the verdict is general it can only be corrected by a new trial, and it must be admitted that the rule as suggested finds much countenance in the text-books; nor will it be necessary to depart from that rule in the present case. Strictly speaking, a special verdict is where the jury find the facts of the case and refer the decision of the cause to the court, with a conditional conclusion, that if the court is of the opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then the jury find for the plaintiff; but if otherwise, then they find for the defendant.
>
> "Examples of special verdicts less formal, however, may be found, and the usual course is to sustain such verdicts if they contain all the facts necessary to a

proper judgment between the parties in respect to the matter in controversy. Courts also, in the trial of issues of fact, often propound questions to a jury, and the rule is well settled that such a special finding, even when it is inconsistent with the general verdict, shall control in determining what judgment shall be rendered in the case.

"Undoubtedly a special verdict is erroneous if it does not find all the facts essential to the rendering of the judgment; but if it contain all the facts required for that purpose the better opinion is that the court of original jurisdiction may render such judgment as the facts found require, and if they err, and the error is apparent in the record, that such error may be re-examined on writ of error in this court.

* * * * * * * *

"All the facts are found in this case, and they are all apparent in the record, and inasmuch as the question to be determined is what judgment ought to be rendered on those facts, the court is of the opinion that it is not necessary to order a new *venire*."

In *Ballew* v. *United States*, 160 U. S. 187, an indictment charged two separate crimes in two different counts, and the jury returned a general verdict of guilty, which, this court said, imported a conviction upon both counts. Upon writ of error to the judgment entered upon that verdict, this court held that the conviction was erroneous as to the first count but good as to the second. That presented the question, as stated by the court, "whether error as to one only of the counts must lead to reversal of the conviction on that count alone or to like reversal as to the count where no error exists; in other words, whether, after reversing the judgment, which was on both counts, we can annul the verdict upon the first count alone, and leave the verdict

to stand as to the second count unaffected by the reversal" (pp. 197, 198). In discussing that question the court adverted to the fact that at common law a reviewing court upon writ of error in a criminal case had no power upon reversal either to enter a proper judgment or to remand the cause for that purpose, and that it was not until the statute of 11 & 12 Vict. c. 78, sec. 5, that such power was given in England (p. 198). The court then referred to Section 24 of the Judiciary Act of 1789, which was cited in *Insurance Companies* v. *Boykin, supra,* and to Section 2 of the Act of June 1, 1872, which was cited in *Insurance Company* v. *Piaggio, supra,* and to several other statutes, and then said (pp. 201, 202):

> "It thus conclusively appears that the authority of this court to reverse, *and remand with directions to render such proper judgment as the case might require,* upon writs of error in criminal cases, to state courts and to the Circuit Courts in capital cases, was confessedly conferred by express statutory provisions, and that a like power was conferred upon the Circuit Courts of Appeals and Circuit Courts in cases where they exercised jurisdiction by error in criminal cases over the District Court.
>
> "From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that *general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require.*"

The court thereupon concluded that, as the only error in the record related to the crime covered by the first count, the judgment should be reversed and the cause remanded *"with instructions to enter judgment upon the second count of the indictment"* and for such proceedings

as to the first count as may be in conformity with law (p. 203).

The substance of Section 24 of the Judiciary Act of 1789 and of Section 2 of the Act of June 1, 1872, was embodied in Section 701 of the Revised Statutes (which is the form in which they were in force when *Ballew* v. *United States* was decided), and that Section still remains in force and is as follows:*

> "The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, OR may direct such judgment, decree, or order to be rendered, OR such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon."

And that statute is made applicable to the Circuit Courts of Appeal by Section 11 of the Act of March 3, 1891, 26 Stat. 829 (*Ballew* v. *United States, supra,* at pp. 201, 202; *Realty Co.* v. *Montgomery,* 284 U. S. 547, 550).

Nothing pertinent to the case at bar was actually decided in *Realty Co.* v. *Montgomery,* 284 U. S. 547, but it is pertinent to observe that the court there said that the statute "warrants *the giving of directions* by an appellate court for further proceedings below in conformity with a modification or a reversal of a judgment where, in

*Section 701 *purports* to be now embodied in U. S. Code, Title 28, sec. 876, but it is there incorrectly transcribed. As there transcribed, the words "circuit court, or district court acting as a circuit court, or of a" which immediately precede the words "district court in prize causes," are omitted, so that it would seem to be limited to judgments, decrees and orders "of a district court in prize causes." The Code is only *prima facie* the law, and the original enactment, not the Code, controls (Act of June 30, 1926, 44 Stat. pt. 1). The section is quoted in its correct form in *Realty Co.* v. *Montgomery,* 284 U. S. 547, 550 (1931).

consequence of such action, such proceedings should be had." (p. 551.)*

In *Cragin* v. *Lovell*, 109 U. S. 194, in which the reversal was put upon the ground that the declaration did not state a cause of action, the court said (pp. 199, 200):

> "This court, on reversing a judgment of the circuit court, *may order such judgment for either party as the justice of the case may require.* Rev. Stat. § 701; *Insurance Cos.* v. *Boykin*, 12 Wall. 433. In the case at bar, the order, following the precedent of *Slacum* v. *Pomery*, 6 Cranch. 221, will be that the judgment below be reversed, and the case remanded with directions that judgment be arrested."

Whether or not the court is inclined to limit or reconsider the *Slocum case* has become an interesting topic among the profession since *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654,** and we take the liberty of making the observation that it seems to us that the history of the Act of 1789 and what has been said and decided in the cases to which we have called attention would have a very material bearing in that connection. As judgment may be arrested, after and notwithstanding a verdict, because the declaration does not allege facts sufficient to constitute a cause of action, it would seem to us that a like course is permissible where the evidence does not establish facts sufficient to constitute a cause of action. It seems to us that it is law only, and not a re-examination of the facts, which is involved in each instance.

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*See, also, *Camp* v. *Gress*, 250 U. S. 308, where it was said (p. 318):

> "In cases coming from federal courts the Supreme Court is given by statute full power to *enter such judgment* or order as the nature of the appeal or writ of error (or certiorari, § 240 of the Judicial Code) requires. Revised Statutes, § 701. Circuit Court of Appeals Act of March 3, 1891, c. 517, § 11, 26 Stat. 826, 829. See also § 10 of the same act. Compare *Ballew* v. *United States*, 160 U. S. 187, 198, et seq."

**Compare *Preliminary Draft of Rules of Civil Procedure*, prepared by the Advisory Committee, Foreword XII and Rule 56 and notes.

But however that may be, it is demonstrably clear, we submit, that the cases cited certainly prevent an extension of the *Slocum case* to such a situation as is here presented.

The verdict here was not set aside, as was the situation in the *Slocum case*. The Circuit Court of Appeals has not attempted any re-examination of any fact tried by a jury. The verdict here is allowed to stand as a final determination of the facts and is made the basis of the final decision. The error which the Circuit Court of Appeals has found in the record is in what happened after the verdict—in the kind of judgment or sentence which was pronounced upon that verdict—and what it has done is to direct the proper judgment upon that verdict. *Insurance Companies* v. *Boykin* certainly establishes that that may be done under the statute and also that that is "the rule by which courts of error were governed at the common law." See, also, *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498, 499.

The verdict here, in reality and substance, if not in form, was a *special verdict* or at least a general verdict with special findings added; and it may be treated as such just as the verdict in *Insurance Company* v. *Piaggio, supra,* was in substance so treated. It found the fact of fraudulent claim because it found that the property destroyed was worth only $17,000, and the settled rule is that special findings control the general (*Davis* v. *Ætna Acceptance Co.*, 293 U. S. 328, 332; *Walker* v. *Southern Pacific R. R.*, 165 U. S. 593, 597, 598; *Victor-American Fuel Co.* v. *Peccarich,* 209 Fed. 568, 571, which is cited in *Davis* v. *Ætna Acceptance Co., supra; Pangburn* v. *Buick Motor Co.*, 211 N. Y. 228, 234).

The constant practice is for the appellate court to render final judgment upon reversal where special findings have been made by the court (*Fort Scott* v. *Hickman,* 112 U. S. 150, 164, 165), and, as already noted, the same thing

has been done where special findings have been made by a jury (*Hooe* v. *Groverman,* 1 Cranch. 214; *Fitzsimmons* v. *Newport Ins. Co.,* 4 Cranch. 185; *Otis* v. *Watter,* 11 Wheat. 192; *Comegys* v. *Vasse,* 1 Pet. 193; *Bank of Alexandria* v. *Swann,* 9 Pet. 33; *McCool* v. *Smith,* 1 Black 459, cited at p. 51, *supra*). No "reexamination of the facts" is involved whether the findings be made by the court or by the jury. Indeed, special findings by the court have been specifically declared to be equivalent to a special verdict of a jury (*Fort Scott* v. *Hickman, supra; Davis* v. *Ætna Acceptance Co., supra*), and it has been specifically held by this court that *the granting of judgment upon special findings by a jury which are inconsistent with its general verdict is not an infraction of the Seventh Amendment* (*Walker* v. *Southern Pacific R. R.,* 165 U. S. 593). In that case the jury returned a general verdict for the plaintiff and at the same time made special findings which were inconsistent with its general verdict, and the trial court thereupon entered judgment *for the defendant,* and its action was affirmed despite a contention that its action violated the Seventh Amendment.

All that the Circuit Court of Appeals has done in the case at bar is to direct the judgment which legally and properly follows from the jury's special finding that the damages were only $17,000. Whether that direction be couched in the phrase "Enter an order in arrest of judgment", as in *Cragin* v. *Lovell,* or in the phrase "Enter judgment for defendant", which would coincide with the direction in *Insurance Co.* v. *Piaggio,* is a mere matter of words. The result is the same whichever form of expression be used, and both phrases have the sanction of prior decisions of this court.

Having heretofore adverted to *Pangburn* v. *Buick Motor Co.,* 211 N. Y. 288, as a case in which a verdict in

form for the plaintiff was regarded as being in substance and reality a verdict for the defendant, we desire to call attention to the fact that, while the New York Court of Appeals there granted a new trial in the exercise of its discretion, it nevertheless distinctly asserted that it had the power, under a statute substantially identical with U. S. Rev. Stat. § 701, to render final judgment dismissing the complaint (p. 236), although New York's Constitution also guarantees trial by jury (Art. I, sec. 2).

The right of the Circuit Court of Appeals to direct the entry of the judgment which it deems proper is also asserted in *Douglas* v. *Edwards,* 298 Fed. 229, 245; *Larocque* v. *Dorsey,* 299 Fed. 556, 559; *American Lumber & Mfg. Co.* v. *Equitable Life Assurance Society,* 45 Fed. 2d 504, 506, each of which was decided after the *Slocum case.*

POINT V.

Reversible error was committed in refusing requested instructions to the jury.

1. Respondent asked the court to instruct the jury that there was no evidence from which the *cost of labor,* claimed in the complaint and proof of claim in the sum of $2,524.50 could be determined and that as to so much of the claim they should find for respondent (R. 21, 308). With respect to that request the court said (R. 308):

> "Now I charge you that, with this modification: unless the books introduced reasonably satisfy you that some definite amount was actually paid by the plaintiff for labor on this particular merchandise. If you find the evidence—*I do not recall it,* but *if you find it from the record* then you can find only for such amount as the plaintiff actually paid for labor."

The so-called modification was actually a *refusal* of the request, for although the court stated that it could not recall any evidence by which the cost of labor could be determined, it nevertheless left it to the jury to say whether there was or not. Indeed, the so-called modification was worse than an outright refusal, for it in effect conveyed to the minds of the jury that there probably was some evidence from which the cost of labor could be determined, even though the court knew of none and opposing counsel pointed out none.

The rule is well established that, where there is no evidence to sustain one of several charges or counts of negligence, that charge or count must be withdrawn from the consideration of the jury by an instruction to that effect, and that a refusal to withdraw it constitutes error requiring that an adverse verdict be set aside (*Wilmington Mining Co.* v. *Fulton*, 205 U. S. 60, 77-79; *Chicago, St. Paul, M. & O. Ry. Co.* v. *Kroloff*, 217 Fed. 525, 528, 8 C. C. A.; *Erie R. Co.* v. *Gallagher*, 255 Fed. 814, 817, 2 C. C. A.; *Buckeye Cotton Oil Co.* v. *Sloan*, 250 Fed. 712, 722, 6 C. C. A., per Mr. Justice SANFORD, as District Judge); and of course the same rule is applicable to particular items of any claim, whether constituting separate counts in a pleading or not. "Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested" (*Greenleaf* v. *Birth*, 9 Pet. 292, 299).

Whether or not there is any evidence to support a particular item or charge or count is a question of law for the court; and when a request is made to withdraw a particular item or charge or count from the consideration of the jury upon the ground that there is no evidence to sustain it, the court is called upon to decide that question. If the court itself can recall no such evidence, the obvious course is to call upon opposing counsel to point it out if it exist;

and if the court recall none and opposing counsel point out none, then the requested instructions should be given. For a court merely to say that, although it recalls no such evidence, yet the jury may possibly find it somewhere in the record, is to fail to perform the functions which the law assigns to the judge.

The dissenting judge in the Circuit Court of Appeals, both in his dissenting opinion upon the reargument (R. 338, 339) and in the opinion which he wrote for the court upon the first hearing (R. 318), referred to the testimony of the accountant Gorbea, but, as already pointed out at pages 32, 33, *supra,* the accountant's testimony, and the books to which he referred, related to *goods in process* and not to *cost of labor on goods in process*—a distinction which the dissenting judge failed to note and which led him into considerable confusion (See further upon this point the petition for rehearing at R. 330, 331).

In the prevailing opinion of the Circuit Court of Appeals upon the reargument it is distinctly and correctly stated that there is no evidence in the case to sustain this item and that counsel for petitioner has pointed out none, though requested to do so (R. 336). It consequently follows that the failure to charge as requested constitutes reversible error.

2. Respondent also asked the court to instruct the jury that there was no evidence from which it could determine the *market value of merchandise sold to petitioner by its president* and that petitioner consequently could not recover for the loss of such merchandise (Request 9, at R. 22); and it excepted to the court's refusal to give that instruction (R. 310).

Rivera Soler, petitioner's president, had testified that when petitioner was organized he had sold it certain machines, but he did not say what the purchase price was

and also said that he was unable to say how much he had paid for them (R. 105, *supra*, p. 16). He also had testified that in July, 1931, he had sold machines to petitioner for $7,500 but did not know where he had gotten them or what he had paid for them (R. 115, *supra*, pp. 17, 18). He also had testified that he had sold thread to petitioner at a price which was higher than he had paid for it and was unable to say what he had paid for it (R. 111, *supra*, p. 20).

We thus have the situation of a corporate officer, charged with the duty of running the corporation's business, purchasing goods which the corporation needs in its business and turning over the goods to the corporation at a profit to himself. If nothing more were involved than the fraud thus committed by the officer upon his own corporation, perhaps respondent could not complain. What respondent complains of is the utter absence of any evidence as to the value of the goods. The burden obviously was upon petitioner to prove value, and as that evidence was not given it was reversible error to refuse the requested instruction (See cases cited at p. 62, *supra*).

Conclusion.

1. Upon the ground stated in the prevailing opinion of the Circuit Court of Appeals upon the reargument, *viz.*, that the jury's verdict finds fraud and hence establishes the fact which entitles respondent to judgment, the judgment of that court should be affirmed (Points III and IV at pp. 34-61, *supra*).

2. Upon the ground that the evidence is not legally sufficient to sustain any verdict for petitioner (Points I and II at pp. 22-34, *supra*), the judgment of the Circuit Court of Appeals likewise should be affirmed, unless this court be of the opinion that the *Slocum case* requires that

upon a reversal upon that ground there still must be the formality of a new trial; and in that event the judgment of the Circuit Court of Appeals should be modified so as to direct that the case be remanded to the District Court with instructions that upon a new trial a verdict should be directed for respondent.

3. If this court should be of the opinion that misdirection to the jury is the only error in the record (Point V at pp. 61-64, *supra*), the judgment of the Circuit Court of Appeals should be modified so as to direct that the judgment of the District Court be reversed and a new trial awarded.

Respectfully submitted,

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